

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: RAMADHANI, J.A., MNZAVAS, J.A., And LUBUVA, J.A.)

CIVIL APPEAL NO. 44 OF 1995

BETWEEN

TANGANYIKA MOTORS LIMITEDAPPELLANT

AND

TRANSCONTINENTAL FORWARDER LIMITED....RESPONDENT

(Appeal from the decision of the
High Court of Tanzania at
Dar es Salaam)

(Mapigano, J.)

dated the 26th day of July, 1995

in

Civil Case No. 126 of 1986

RULING OF THE COURT

RAMADHANI, J.A.:

The appellant company is the Tanganyika Motors Ltd. and the respondent company is the Transcontinental Forwarders Ltd. When the appeal came up for hearing the respondent company raised a preliminary objection that the appeal is incompetent as no leave was asked for and given prior to its filing.

On behalf of the respondent company was Mr. Kinguji, learned advocate, who cited three of our previous decisions on the requirement of leave to appeal against orders of the High Court. On the other hand Mr. Majithia, learned counsel for the appellant company, resisted the preliminary objection distinguishing this appeal from the three cited authorities.

It is necessary to preface this ruling with a brief account of what happened in order to appreciate the arguments for and against the preliminary objection.

The appellant company filed a plaint in the High Court at Dar es Salaam claiming to be the holder of the offer of a right of occupancy of Plot 61744 at Kurasini, Dar es Salaam. It was further claimed that the respondent company committed trespass on the said plot. So, the appellant company sought injunction restraining/ preventing the respondent company from trespassing and for a declaratory order that the said premises belong to the appellant company.

The respondent company, as usual, filed a written statement of defence to which the appellant company filed a reply. After many adjournments the suit was by consent fixed for hearing on August 17, 1990. On that date the appellant company was not duly represented so the High Court (MACKANJA, J.) dismissed the suit with costs to be born by the appellant company. That was on August 28, 1990, very close to four years since the suit was filed.

A notice of appeal by the appellant company against that dismissal was filed on August 31, 1990 but it was struck out on June 2, 1994. So, on August 30, 1994 an application for execution of the High Court decree was filed under O.21 R.33(1) by the respondent company. That was four years after the decision of dismissing the suit. That application for the execution of the decree was granted by MAPIGANO, J. on 5th September, 1994.

The appellant company was aggrieved by the grant of execution of the decree and applied for a review of that grant. The reason was that the application for execution was made more than

after the date of the decree (four years to be precise) and that O.21 R.20(1)(a) a notice to show cause as to why the decree should not be executed was required to be issued to the appellant company but that had not been done. So, MAPIGANO, J. discharged the order of execution. A notice to show cause was issued to the appellant company and on July 26, 1995 MAPIGANO, J. made the following ruling:

"I entirely agree with the submissions made by Mr. Kinguji. The application for execution of the decree granted to the Applicant/Defendant is granted."

It is this 'Order' of July 26, 1995 by MAPIGANO, J. that is the subject of this appeal.

As already said, Mr. Kinguji made a preliminary objection saying that there is no appeal as of right from an order of the High Court. The learned advocate argued that the order in dispute does not fall under paragraphs (a) or (b) of subsection (1) of section 5 of the Appellate Jurisdiction Act, 1979. He pointed out that the order falls under paragraph (c) of subsection (1) of section 5.

Mr. Kinguji referred us to The Registrar of Buildings v. Felix Bwogi t/a Eximpo Promotion and Services, Civil Appeal No. 19 of 1988 (unreported); B.P. Tanzania Ltd. v. Ebrahim Salum Ebrahim t/a Tahfif Mini Super Market, Civil Reference No. 4 of 1992 (unreported) which was followed in The National Engineering Co. Ltd. v. Eliudi Mathe Ngore, Civil Appeal No. 18 of 1993 (unreported).

In all three above cited decisions, we held that orders by the High Court fall under Section 5 (1)(c) and that they need leave to appeal.

Mr. Majithia, on the other hand, submitted that no leave is required for this appeal. The learned advocate pointed out that all three authorities relied upon by Mr. Kinguji deal with appeals from orders of the High Court. Mr. Majithia submitted further that the present appeal is not from an order of the High Court but from a decree of the High Court.

Mr. Majithia pointed out that the Appellate Jurisdiction Act, 1979 does not define a decree. So, he argued, we have to resort to the Civil Procedure Code, 1966 (C.P.C.). He said that the term decree is defined in s. 3 of the C.P.C. and that it includes the rejection of a plaint and the determination of any question within ss. 38 and 89 of the C.P.C. Mr. Majithia pointed out further that s. 38 of the C.P.C. deals with execution of decrees and that is what was before MAPIGANO, J. So, the learned advocate argued, what MAPIGANO, J. gave was by that definition a decree irrespective of what it has been titled.

Mr. Majithia drew our attention to Mulla: Civil Procedure Code, 11th ed. dealing with the definition of decree in s. 2 of the Indian Civil Procedure Code which is in pari materia with s. 3 of the C.P.C.

Citing Commentaries: The Code of Civil Procedure by Chitale and Rao 6th Ed. (1957), the learned advocate submitted that there are five classes of decrees one of which is that from the determination of questions under ss. 48 and 144 (in pari materia with ss. 38 and 89 of the C.P.C.).

Civil Appeals to this Court are governed by section 5 of the Appellate Jurisdiction Act, 1979. Subsection (1) of that section, particularly paragraphs (a) and (c), are relevant here. It is provided as follows:-

"5 - (1) In civil proceedings, except where any other written law for the time being in force provides otherwise, an appeal shall lie to the Court of Appeal -

(a) against every decree, including an ex parte or preliminary decree made by the High Court in a suit under the Civil Procedure Code, 1966 in the exercise of its original jurisdiction;

(b) ...

(c) with the leave of the High Court or of the Court of Appeal against every other decree, order, judgment, decision or finding of the High Court."

Paragraph (b) which has not been reproduced enumerates nine orders of the High Court made in its original jurisdiction which are appellable as of right.⁵ It is not disputed that the order of MAPUGAO, J., the subject matter of this appeal, is not one of the orders listed in paragraph (b).

Now, the three decisions of this Court which have been cited to us by Mr. Kinguji deal with orders of the High Court and we have said that orders are subject to paragraph (c) quoted above and that in order to appeal against them leave is required.

So, the legal position is that any order of the High Court which is not one of the nine orders listed in paragraph (b) of subsection (1) of section (5) of the Appellate Jurisdiction Act, 1979, falls under paragraph (c) of that section and is only appealable with leave of the High Court or of this Court.

Mr. Majithia did not challenge that but submitted that some expressions, though are termed orders, are by definition decrees and so do not fall under paragraph (c) but under paragraph (a) and, therefore, do not need leave to appeal.

A decree is defined in s. 3 of the C.P.C. as:

"the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 38 or section 39, ..."

Mulla at page 8 dealing with s. 47 on execution proceedings (in pari materia with s. 38 of C.P.C.) says:

"An execution proceeding, though a proceeding in a suit, is not a suit. The combined effect of sec. 2 (2) and sec. 47 is that an order passed in execution proceedings will be tantamount to a decree ..."

The learned author goes further to give three conditions: one so far as regards the Court passing it, it conclusively determines

a question; Two the proceedings arise between the parties to the suit in which the decree was passed, or their representatives; and three the proceedings relate to the execution of the decree.

Chitale and Rao at page 131 also point out that the Code of Civil Procedure recognizes five classes of decrees including a determination of a question within s. 47 or s. 144 in part materia with ss. 38 and 89 of the C.P.C.

So, Mr. Majithia argued, since what was before MAHESANO, J. was an execution proceeding then under the operation of ss. 3 and 38 what was given was a decree and not an order. The learned counsel submitted that as the three decisions of this Court dealt with appeals from orders of the High Court then they are distinguishable from the present appeal because it is an appeal from a decree.

We are in agreement with Mr. Majithia that what MAHESANO, J. gave and which is the subject matter of this appeal is, by definition and the combined operation of sections 3 and 38 of C.P.C., a decree and not an order.

The issue which remains is whether the appeal against this decree falls under paragraph (a) or paragraph (c) of section 5 (1) of the Appellate Jurisdiction Act, 1979.

Section 5 (1)(a) provides that an appeal shall lie as of right to the Court of Appeal "against every decree". On the other hand, paragraph (c) states that an appeal shall lie to the Court of Appeal with leave "against every other decree". Now, the question is this,

is the decree by MALIGANO, J. in the category of "every decree" or is it in the class of "every other decree". In other words: what is "every decree" and what is "every other decree" and into which definition does the decree in dispute belong.

We are thankful for the enlightening research that Mr. Majithia did after we adjourned to give counsel time to probe into this matter as it seemed to us that it was the first time that the issue was before this Court.

Mr. Majithia gave us three examples of "every other decree" under paragraph (c). First, decrees from proceedings in prerogative writs. Second, decrees in suits challenging the administrative actions of the Registrar of Titles under Caps. 113 and 334. Lastly, decrees in the exercise of the appellate jurisdiction of the High Court.

For the easiness of reference we feel that we have to reproduce again paragraph (a) of subsection (1) of section 5 of the Appellate Jurisdiction Act, 1979. It is provided that an appeal shall lie to the Court of Appeal -

"(a) against every decree, including
ex parte or preliminary decree
made by the High Court in a suit
under the Civil Procedure Code,
1966 in the exercise of its
original jurisdiction."

It appears to us that for a decree to come under paragraph (a) it must meet three conditions: One, it must be made "in a suit". Two, it must be made "under the Civil Procedure Code, 1966". Three,

it must be "in the exercise of the original jurisdiction" of the High Court.

Now, was the decree in question made in a suit? Mulla at p. 8 says:

"An execution proceeding, though a proceeding in a suit, is not a suit". (emphasis supplied)

Yet, Chitale and Rao at p. 139 propound as follows:

"The determination of any question within s. 47 or s. 144 is expressly included in the definition "decree" though such determination is neither made in a suit, nor is drawn up in the form of a decree." (emphasis supplied).

As already said s. 47 referred to above, is in pari materia with our s. 38: execution proceedings.

From the two treatises we have no doubt in our minds that the decree in question was not obtained in a suit. As such it does not meet the first condition. We may say in passing that the other two conditions appear to be satisfied. However, as all three conditions have to be met then the decree in question does not fall under paragraph (a) but is one of "every other decree" of paragraph (c) and therefore requires leave to appeal.

In a nutshell, what MAPIGANO, J. gave on 26th July, 1995 was a decree because of the joint operation of section 3 and 38 of the

C.P.C. However, as an execution proceeding is not a suit, so, the decree is not "every decree" of paragraph (a) but "every other decree" of paragraph (c) and, as much, leave to appeal is required.

The preliminary objection is allowed with costs. In the event the appeal is struck out under Rule 82 because an essential step in the proceedings has not been taken. It is so ordered.

DATED at DAR ES SALAAM this 30th day of May, 1996.




A.S.L. RAMADHANI
JUSTICE OF APPEAL

N. S. MNZAVAS
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


(M.S. SHANGALI)
DEPUTY REGISTRAR